

UNCITRAL and the Vienna Sales Convention

KAZUAKI SONO*

I. Introduction

As the secretary of the United Nations Commission on International Trade Law (UNCITRAL), it is my great honor to be invited to this symposium. This year is indeed the right time to grasp the encouraging trends in the world towards the implementation of the Vienna Sales Convention. The holding of this symposium is therefore very timely and could further encourage other countries to proceed in favor of the convention. I very much appreciate the holding of this symposium as an indication of interest in and support of the work of UNCITRAL by the American Bar Association.

The United States is one of the most important and influential members of the Commission. Ever since the Commission was established in 1966, UNCITRAL and its secretariat have constantly received warm support from the United States. The State Department always sends high level experts for each item under consideration by UNCITRAL and contributes greatly to the maintenance of the high standard of deliberations in the commission. Furthermore, during the most crucial period when the direction of activities of UNCITRAL had to be established, the United States sent Professor John Honnold as the secretary of the Commission for about five years. The strong leadership and dedication of the United States in a constructive and positive manner has very much assisted in the establishment of the high reputation which the commission enjoys today. The State Department's effort to obtain adequate guidance through various sections of the American Bar Association, including of course the Section of International Law and Practice, in order to ascertain appropriate American views which should be reflected in the deliberations at UNCITRAL has been, in my view, a beautiful model of how to organize effective internal coordination. I might add in this regard that a tradition has been established in the Sixth (Legal) Committee of the General Assembly of the United Nations to consider the annual reports of the commission as the first agenda item, since this is a comfortable item with which to begin, and that the representative of the United States is always the first speaker.

*Secretary of the United Nations Commission on International Trade Law; Professor of Law (on leave), Hokkaido University, Japan.

II. Description of UNCITRAL

Since the Vienna Sales Convention is one of the most important products of UNCITRAL, let me first briefly describe the commission. I hope that this will assist your overall assessment of UNCITRAL and your understanding of the implications surrounding the Vienna Sales Convention.

UNCITRAL is one of the two core international legal bodies created by the United Nations. The other is, of course, the International Law Commission. The mandate of UNCITRAL is the unification and harmonization of international trade law in order to eliminate legal obstacles to international trade and to ensure an orderly development of economic activities on a fair and equal basis. Recently, the commission's role of coordinating the activities of other international organizations in this field has been emphasized.

When the commission was created in 1966, there already existed certain international organizations engaged in the unification of private law, such as the Hague Conference on Private International Law, and UNIDROIT in Rome. But none of these organizations had a truly global representation. In creating UNCITRAL the General Assembly established an organization in which all geographical regions and the principal legal systems of the world are represented.

1. *Prescription, Carriage of Goods and Sales Convention*

Since its creation the commission has accomplished concrete legislative work in several fields. It has produced three conventions. The first is the Convention on the Limitation Period in the International Sale of Goods adopted in New York in 1974.¹ The Prescription Convention establishes unified rules for the operation of the limitation or prescription period in the international sale of goods. The convention attempts to avoid the sharp contrast in approaches between common law countries and civil law countries, that is to say, between the common law "statute of limitation" approach at the procedural law level and the civil law "prescription" approach at the substantive law level. Besides regulating the limitation period (which is four years as a general rule) for rights and claims arising from international sales contracts, the convention also touches upon the interesting question of international *res judicata* or the international effect

¹Convention on the Limitation Period in the International Sale of Goods (U.N. Doc. A/CONF.63/15) (1974). The official records of the 1974 conference are published in A/CONF.63/16 (Sales No. E.74.V.8). As of 31 March 1983, seven states had ratified or acceded to the convention: Argentina, Czechoslovakia, Dominican Republic, Egypt, Ghana, Norway, Yugoslavia. Ten states must ratify or accede before the convention comes into force (art. 44).

of prescription, a subject which is worthy of close examination in a study of the law of international civil procedure.

A Protocol to the Prescription Convention was adopted in 1980 at the diplomatic conference which prepared the Vienna Sales Convention, to align the contents of the Prescription Convention with those of the Vienna Sales Convention.² Because of the adoption of the Vienna Sales Convention, and due to the increasing reputation of the work of the commission in general, interest in the Prescription Convention will grow further and it is my prediction that it will go into effect in the near future at almost the same time as the Vienna Sales Convention.

The second of the three UNCITRAL conventions is the United Nations Convention on the Carriage of Goods by Sea of 1978, known as the Hamburg Rules.³ This convention is a revised version of the 1924 Brussels Convention and regulates the operation of international bills of lading. The third convention is, of course, the United Nations Convention on Contracts for the International Sale of Goods adopted in Vienna in 1980:

Two more conventions may emerge from UNCITRAL within a few years, both in the field of negotiable instruments: one dealing with international bills of exchange and promissory notes and the other with international checks. These negotiable instruments would be created only for optional use in international payments and would provide a balanced solution to the conflicting approaches under the civil law system, represented by the Geneva Conventions of 1930 and 1931, and the common law system, represented by the British Bills of Exchange Act of 1882 and the Uniform Commercial Code of the United States.

2. Dispute Settlement

Besides these conventions, the activities of UNCITRAL in the field of settlement of international commercial disputes have been extensive. The commission has repeatedly recommended, through the General Assembly of the United Nations, wider acceptance of the 1958 New York Convention

²Protocol amending the Convention on the Limitation Period in the International Sale of Goods (U.N. Doc. A/CONF.97/18, Annex II), reprinted in the official records of the 1980 Vienna Conference (A/CONF.97/19; Sales No. E.82.V.5). As of 31 March 1983 only Egypt had acceded to the Protocol. The Protocol will come into force only after the 1974 and 1980 conventions are in force and two states have acceded to the Protocol (art. IX).

³United Nations Convention on the Carriage of Goods by Sea, 1978 (U.N. Doc. A/CONF.89/13, Annex I), reprinted in the official records of the 1978 Hamburg conference (A/CONF. 89/14; Sales No. E.80.VIII.1). As of 31 March 1983 eight states had ratified or acceded to the convention: Austria, Chile, Egypt, Morocco, Romania, Tunisia, Uganda, United Republic of Tanzania. Twenty states must ratify or accede to the convention before it will come into force (art. 30).

on the Recognition and Enforcement of Foreign Arbitral Awards.⁴ It adopted the UNCITRAL Arbitration Rules of 1976⁵ after extensive consultations with arbitral institutions and arbitral experts, and the General Assembly has recommended the use of the rules in the context of international commercial relations.

The UNCITRAL Arbitration Rules have become well known in a short span of time and are now used around the world. Many arbitral institutions have in a variety of ways accepted or adopted the rules. It is well known that "Optional Arbitration Clause for use in contracts in U.S.A.-U.S.S.R. Trade — 1977 (Prepared by the American Arbitration Association and the Moscow Chamber of Commerce and Industry),"⁶ with the Stockholm Chamber of Commerce acting as an appointing authority, includes the UNCITRAL Arbitration Rules. You may perhaps be aware that thousands of cases are presently being tried in The Hague under the UNCITRAL Rules in accordance with the "Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran,"⁷ an agreement concluded in connection with the release of hostages a few years ago.

The wide acceptance of the UNCITRAL Arbitration Rules demonstrates a unique approach to the global unification of the procedural aspects of arbitration, since it accomplishes this unification without resort to the traditional convention approach, which would require congressional or parliamentary action. This is a unification through agreements of parties and arbitral institutions, based upon their confidence in the UNCITRAL Rules and without any need for imposition by law.

Encouraged by the success of the UNCITRAL Arbitration Rules, the commission is now engaging in the preparation of a model arbitration law, which would provide a model for the adaption of national laws in order to meet the increasingly important role played by commercial arbitration in the settlement of international disputes. One of the aims of the project is to free international commercial arbitration from old and unnecessarily complicated and strict procedural laws in order to respect the parties' autonomy in the arbitral process and to smooth the enforcement of international arbitration awards under the 1958 New York Convention.

⁴Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). 330 U.N.T.S. 38, No. 4739 (1959); [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997.

⁵UNCITRAL Arbitration Rules. 31 U.N. GAOR, Supp. No. 17, Doc. A/31/17 (1976), reprinted in VII UNCITRAL Yearbook: 1976 at 22, and 15 INT'L LEGAL MATERIALS 701 (1976).

⁶16 INT'L LEGAL MATERIALS 444 (1977).

⁷20 INT'L LEGAL MATERIALS 224 (1981).

3. Unification and Harmonization

Having completed many of its undertakings on traditional subjects, the commission is now engaging in yet another ambitious project. This work is in the field of industrialization. Developing countries suffer from a lack of expertise in negotiating and drafting contracts in this area, particularly due to the complexity of the subject. Confusion exists in this field not only because of divergencies among legal systems, resulting in difficulties in comprehending the various and often conflicting legal implications of contracting techniques, but also because of the sometimes contradictory approaches which are promoted by the various international organizations already engaged in the field. The commission believed that as the core legal body in the field of international trade law, and pursuant to its coordinating function, it could promote unification and harmonization in approaches both vertically and horizontally so as to eliminate the existing conflicts and thus promote the establishment of a better order and foster a healthier industrialization process.

Thus, the commission is now engaging in the preparation of a legal guide on contracts for the construction of large industrial works. In this task the commission enjoys the full cooperation of other international organizations, including the World Bank. Our expectation is that a concrete and detailed legal guide could promote greater trust between developed and developing countries with respect to the question of industrialization as a whole.

4. Funds Transfers

There are also several other projects in which the commission presently engages. One of these projects is the preparation of the legal guide for the electronic funds transfers which are becoming important means of international payment due to rapid technological progress. In this context, the International Monetary Fund and the Bank of International Settlements, as well as central banks of major countries, are fully cooperating. The recent UNCITRAL recommendation to use the SDR as the international unit of account for global conventions⁸ is an indication that UNCITRAL is also the effective body where East and West meet in a pragmatic manner.

III. Vienna Sales Convention

Now, distinguished participants, I come more concretely to the subject of the Vienna Sales Convention. This convention provides uniform rules on contracts for the international sale of goods. The convention is rapidly gaining popularity in the world and my personal prediction is that it will enter into force toward the end of 1984. The convention will be made

⁸37 U.N. GAOR, Supp. No. 17, para. 63, Doc. A/37/17 (1982).

applicable to the sales contract concluded between parties having places of business in different contracting states. Nationality of parties has no relevance to the application of the convention. Freedom of contract has been retained. Most of the convention's provisions are supplementary to agreements between parties. Detailed practical and basic rules are provided to assist parties in cases where their agreement does not otherwise provide.

Because of the importance of trade usages, let me briefly illustrate this aspect of the convention taking INCOTERMS of the International Chamber of Commerce as an example. In some countries INCOTERMS are considered to express merchant customs. Therefore, when a trade term is used, such as FOB or CIF, the courts rely upon INCOTERMS for a specification of the obligations of the parties. In other countries INCOTERMS are relevant to the interpretation of the contract only if the parties have so stipulated. If they have not, the courts interpret the trade term in the light of prior court decisions or, in the United States, according to statutory requirements (*e.g.*, U.C.C. §§ 2-319 to 2-325).

The same result will occur under the convention. According to article 9, the parties are bound by any usage to which they have agreed. Furthermore, they are considered, unless otherwise agreed, to have implicitly made applicable to their contract a usage of which they knew or ought to have known and which in international trade is widely known to, and is regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Therefore, the application of INCOTERMS to the contract will have the effect that the risk of loss provisions found therein will prevail over the risk of loss provisions in convention in the same way that the risk of loss provisions in INCOTERMS currently prevail over the risk of loss provisions in national law. In this respect, the convention will bring no change to the current situation. The convention and INCOTERMS, or more general trade usages, are, therefore, complementary or mutually supplementary rather than in conflict.

1. *Background*

The attempt to unify the law of international sale of goods is not new in the international arena. Indeed, in the early 1930s UNIDROIT initiated a project to prepare a uniform law under the auspices of the League of Nations. This attempt resulted in the adoption of the two 1964 Hague Conventions: one on the international sale of goods and the other on the formation of contracts for international sales.⁹ These conventions are

⁹Convention relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 (1972); Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 169 (1972). The texts are reprinted in 3 INT'L

presently in force but the number of contracting states is very limited and they are mostly from western Europe. This is the reason why the commission decided to proceed to revise and improve the uniform rules contained in these 1964 Hague Conventions. After more than ten years of preparatory work by the commission, the Vienna Sales Convention was adopted in April 1980 at a United Nations diplomatic conference in which sixty-two states participated.

2. *Essential Characteristics*

Besides the retention of the principle of the freedom of contract in international sales, the essential characteristics of the Vienna Sales Convention are simplicity, practicality and clarity. It is free of legal short-hand, free of complicated legal theory and easy for businessmen to understand.

The use of any legal short-hand expression, such as *force majeure*, tends to produce different meanings depending upon which legal system applies. Therefore, the convention avoids the use of any short-hand terms which might be susceptible to receiving different interpretations. In cases in which a short-hand expression had to be used, such as the word "delivery," the drafters of the convention provided a clear definition. That the convention is free from dogma is important because it is, after all, businessmen who must understand the meaning of the provisions. The convention is written in businessmen's language and spells out practical details in a manner similar to that of the Uniform Commercial Code of the United States. In a dogma-oriented jurisprudence, a rule tends to be drafted in an abstract way so as to cover all possible situations. This was the approach of the 1964 Hague Conventions. However, the Vienna Sales Convention is modest in this respect. It even admits that some matters are not covered and are left to be resolved by the law applicable under the traditional rules of private international law.

3. *Prospects for the Convention*

The convention now enjoys praise throughout the world as a workman-like attempt to devise legal rules and practical procedures for international sales transactions. Favorable attitudes prevail in countries all over the world — whether from the South, North, East or West — and no seriously critical comments have been heard. With bright prospects for the entry of the convention into force, unification in this field at the global level after over half a century of efforts is finally in sight. It is noteworthy that this

LEGAL MATERIALS 854, 864 (1964). Belgium, Federal Republic of Germany, Israel, Italy, Netherlands, San Marino, The Gambia, and the United Kingdom ratified or acceded to the sales convention, and these same states, with the exception of Israel, adopted the formation convention.

excitement is also shared by those states which first ratified the 1964 Hague Sales Conventions. Once the convention enters into force, it will assist to smooth the process of international sales.

The Vienna Sales Convention will enter into force one year after the tenth ratification or accession is received. Of course, much time is often needed in many countries for internal processing for ratification even after a substantive decision has been made. As of today six states have already either ratified or acceded to the convention. These states are Argentina, Egypt, France, Hungary, Lesotho and Syria. Furthermore, at the recent annual session of UNCITRAL, we were informed that official steps toward the ratification of the convention were being taken in several states. At the seminar of the Council of Mutual Economic Assistance (CMEA) held in Moscow in March this year, general approval was given in favor of both the Vienna Sales Convention and the Prescription Convention. The Asian-African Consultative Committee has recommended that its member states favorably consider ratifying the Vienna Sales Convention. German-speaking states—including Austria, Federal Republic of Germany, German Democratic Republic and Switzerland—have already established a common German text of the Vienna Sales Convention. Scandinavian countries are known to be in the process of ratification next year. Many international meetings, including an Asian/Pacific Regional Trade Law Seminar organized by the government of Australia and to be held next year, are also focusing on the convention because of its importance. The International Chamber of Commerce now predicts that this important convention will enter into force as early as 1984.

4. The U.S. and Ratification

Many countries would certainly be influenced if the United States ratified the Vienna Sales Convention. The speed of the rolling of the bandwagon will be accelerated. Moreover, it is not an overstatement to indicate that many countries are in fact waiting for the United States to ratify the convention so that officials there can accelerate procedures for approval of the convention. Besides being an important and influential member of UNCITRAL, the attitude of the United States is now closely observed by the world with anxiety that the United States takes an active leadership in this important field.

Mr. Chairman, and distinguished participants, UNCITRAL will continue to implement its mandate to harmonize and unify the law of international trade by eliminating legal obstacles which may impede the smooth flow of trade, and will continue to coordinate activities of other international organizations concerned as the core legal body in the field of international trade law. The interest you exhibit today is a great encouragement to

the commission. I once again express my profound gratitude and respect to this timely gathering of American lawyers to consider the Vienna Sales Convention, an important test case for the success of the international attempt for the unification of the law of international trade.

